No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This is an appeal, heretofore consolidated by order of court, from decrees declaring respondents to be without fault and dismissing libels in each of the above cases.

The libels were filed by Washington Cooperative Egg and Poultry Association and by Poultry Producers of Central California, respectively, against the M/S "Hindanger", Westfal-Larsen & Co. and General Steamship Corporation, and were consolidated for trial and the consolidated action referred to a Commissioner, as Special Master, for the purpose of taking testimony and reporting to the court. The actions were dismissed as to respondent General Steamship Corporation at the trial but proceeded against the other respondents. The Special Master made his report which was confirmed by the District Court which made findings of fact and conclusions of law. Libelants duly excepted to the report and to the findings and conclusions of the court (89-93-106-111).*

Each of the libels sought to recover for the deviation and delay of the M/S "Hindanger" on a voyage to Buenos Aires, Argentina. The libel of the Washington Cooperative Egg and Poultry Association sets out a claim with reference to the transportation of 4000 cases of eggs from Seattle, Washington, to Buenos Aires and that of the Poultry Producers of Central California claimed with reference to 11,000 cases of eggs transported from San Francisco, California, to Buenos Aires. Both shipments moved on the same voyage of the "Hindanger". Libelants allege that each of these shipments moved under an oral contract of affreightment which was breached by respondents and each libel alleges that the "Hindanger" deviated on this voyage, by reason of which dam-

*Numbers in parenthesis refer to pages of the Apostles.

ages were sustained by libelants. The question of damages was not presented to the Special Master and an interlocutory decree only was sought.

Libelants Poultry Producers of Central California and Washington Cooperative Egg and Poultry Association are each cooperative marketing associations marketing eggs of their member producers. These associations marketed their eggs through a general selling agency known as Pacific Egg Producers, Inc. (259). For some months prior to the time these shipments moved on the "Hindanger" libelants, through their employees and their selling agent, Pacific Egg Producers, Inc., carried on negotiations looking forward to these shipments of eggs to be made to Buenos Aires. At these negotiations, the date of the departure of the ship and the duration of the voyage were important elements of discussion. It was necessary that these factors be known because of competitive conditions that would exist at different times in the egg market at Buenos Aires (255-257). The negotiations contemplated that these eggs would arrive at Buenos Aires early in May (225). If they arrived later, loss would result (256, 257). The representatives of respondents were informed of these market factors (227).

Prior to the first conference libelants were furnished with a sailing schedule showing the contemplated voyage of the "Hindanger" and were given options for space upon the "Hindanger" for a shipment to Buenos Aires on this particular voyage. (Exhibit 2.) In these options the vessel was represented as sailing March 24, 1930, from San Francisco

and arriving at Buenos Aires on or about April 28th. The next step in the negotiations was a conference of February 15, 1930, in which a thorough survey of the possibility of shipping these eggs on the "Hindanger" to Buenos Aires was made and the seasonal nature of the market was discussed (227). It was there agreed that the voyage would be a 35 day voyage (238, 252). As a result of this conference it was agreed that a shipment would be made on the "Hindanger" of approximately 15,000 cases of eggs to Buenos Aires (257) and at this conference all questions relating to the shipment were settled and agreed upon except the rate which was left open for future discussion. At that conference it was agreed that the "Hindanger" would sail the latter part of March (257). The schedule showed this to be March 24th. As a result of this conference, the sales manager of libelant Poultry Producers of Central California commenced assembling the eggs for shipment (257).

On March 8th one Walter Van Bokkelen discussed the question of rate with a Mr. Wintemute, who was vice-president of respondent General Steamship Corporation and authorized to negotiate for the respondents. Van Bokkelen did not own the eggs nor was he purchasing or shipping the same, but was merely to sell them in the Argentine (268 and 273). Such conference was had between Van Bokkelen and Wintemute and that as a result of that conference the rate at which these shipments were transported was agreed upon (297). This information was communicated to libelants (274). It is admitted that a confirmation from libelants to respondents was to fol-

low that conference (354). Mr. Wintemute, testifying on behalf of respondents, attempted to describe that confirmation as a confirmation that libelants would supply the eggs under an oral contract between respondents and Van Bokkelen (354). Libelants' witness, Mr. Lawler, who made the confirmation, testified that he confirmed a booking of space between libelants and respondents (270-278) which confirmation was acepted by Mr. Wintemute for respondents. This also appears from a letter sent by the General Steamship Company to the Pacific Egg Producers, Inc., the selling agent of libelants, wherein a confirmation of the booking is asked. (Exhibit "A".) At this time the date of the departure had been moved up to April 2nd (274). On March 18th a confirmation of booking was sent to Pacific Egg Producers, Inc., libelants' selling agent, which confirmation advised that the vessel would be ready to load March 24th at Seattle and April 4th at San Francisco. (Exhibit 3.) In fact the vessel loaded at Seattle on March 27th (388) and at San Francisco on April 9th (365).

The vessel arrived at Buenos Aires May 29th following a voyage of forty-nine days duration from San Francisco in which calls were made at Bahia and Pernambuco (81). The advertisement of respondents, published in the Guide, a publication in which the respondents advertised in order to convey information to the shippers (329), showed the vessel as calling at Rio de Janeiro, Santos, Buenos Aires and Montevideo, Rosario and Santa Fe (if inducements offer). The calls at Bahia and Pernambuco

were for the purpose of discharging kerosene and gasoline. (126, 128, Exhibit B.) The vessel remained at Montevideo for eight days discharging a cargo of benzine and other commodities. The only delay on the voyage caused by bad weather was about one day which was not unusual on such a voyage. The balance of the delay was the time taken in discharging cargo booked by respondents (136, 137).

Libelants made the shipments described above and were admittedly the owners of the eggs from the time of shipment until they were disposed of by libelants at Buenos Aires. Libelants paid the freight upon these shipments. Libelants thus performed everything to be performed under the contract. In their pleadings, respondents contended that there was no oral contract and that the bill of lading evidenced the only contract existing in the case and respondents denied that its issuance and execution was in pursuance of any oral contract (24). At the trial, however, respondents contended that the shipment was made under an oral contract between respondents and Van Bokkelen.

The issues presented to the Special Master were thus narrowed substantially to, first, whether the shipments moved under oral contracts of affreightment as claimed by libelants; second, whether those contracts were breached by respondents; and, third, whether the vessel deviated on this voyage.

In his report the Special Master found that there was no oral contract entered into between the parties because the various discussions did not result in a definite "meeting of the minds". He then held

that "in the absence of any oral agreement the rights of the different parties, including the question of deviation, must necessarily be determined by the bills of lading" and that under the bills of lading there was no deviation. The District Court signed findings prepared by respondents in which there was a finding of fact that the bill of lading evidenced the contract of the parties. There was no corresponding finding of fact in the Master's report. We will show that in permitting the bills of lading to determine the rights of the parties the Special Master and the court erred in its application of the law to the facts, and will then show libelants' right to recover.

SPECIFICATIONS OF THE ERRORS RELIED UPON IN SUPPORT OF THE APPEAL.

It is libelants' position that under the evidence there was absolutely no foundation for the finding that the bill of lading evidenced the contract of the parties or for the conclusion as a matter of law that it determined libelants' rights. Obviously, if the Special Master and the court below erred in their conclusion as to what constituted the contract of the parties, it becomes necessary that this court determine on all the facts of the record what did constitute that contract, since a proper determination of that question is indispensable to a correct disposition of the case.

The evidence in the case shows that the shipments moved under an oral contract of affreightment. The issue is really narrowed to the question as to whether

the contract was with libelants, who negotiated for the space for many months for the shipment, who were known to be the shippers, and who eventually did ship the eggs, pay the freight on them and accept delivery at Buenos Aires, or with one Van Bokkelen who entered the negotiations at a late date, who had no title to the eggs, who admittedly did not produce them nor intend to ship them, nor agree to pay the freight on them. We believe that when all the evidence is reviewed, this court will, as the Special Master and the trial court did, reject respondents' evidence that the oral contract was with Van Bokkelen. It will then find that the contract was actually made with libelants and was an oral contract. We will then show our right to recover damages for the breach of the agreed voyage.

The assignments of errors upon which this appeal is based are set out on pages 395 to 406 of the apostles herein. With the exception of slight differences in dates they are the same for both actions. In this appeal we are urging all of the assignments set out. In view of the fact that the same argument will support several of the assignments of errors, we will group the assignments of error in the Poultry Producers action and the corresponding assignments in the Washington Association action, which may be considered as bearing on one proposition.

The error of the District Court and the Master in finding that the bill of lading constituted the contract of carriage or that it was issued other than as a receipt for the goods is presented in the following specifications:

No. 2. The court erred in finding that the contract of carriage for the transportation of the shipment of eggs made on board the "Hindanger" by the libelant was evidenced by a written bill of lading issued to the libelant by respondent Westfal-Larsen & Co. and in finding that said bill of lading contained the terms of the contract for the transportation of the shipment of eggs in that said finding is contrary to the evidence; said finding of fact was duly excepted to by libelant.

No. 4. The court erred in failing to find that the bill of lading issued upon receipt of the eggs involved herein was issued by respondent Westfal-Larsen & Co. and received by libelant solely as a receipt and not as a contract of affreightment; the court's failure so to find was duly excepted to.

No. 7. The court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that there is no evidence to show that the bill of lading constituted the contract of carriage between the parties. Said finding was duly excepted to.

No. 9. The Special Master appointed by the court herein erred in finding that the rights of the parties herein must be determined by the bill of lading issued at the time of the receipt of the goods by respondents. Said finding was duly excepted to by libelant.

No. 10. The Special Master erred in failing to find that the bill of lading issued upon receipt of said goods by respondents from libelant was issued solely as a receipt and did not constitute a contract of affreightment between the parties; to which failure to find libelant duly excepted.

The error of the District Court and the Master in failing to find that there was an oral contract of affreightment between respondents and libelants is presented in the following specifications:

No. 3. The court erred in failing to find that the shipment of eggs herein sued upon was transported to Buenos Aires under an oral contract of affreightment between libelant and respondent Westfal-Larsen & Co.; the court's failure so to find was duly excepted to.

No. 5. The court erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco shipper's option upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the

vessel as advertised from Seattle March 20, 1930, and from San Francisco April 2, 1930. The court's failure so to find was duly excepted to.

No. 6. The court erred in finding that for a period of some months prior to the aforesaid shipment, representatives of the libelant and respondents and or their respective agents conferred in preliminary negotiations regarding space, rates, sailing times, vessels, and other sundry matters concerning the general question of the shipment of eggs from the Pacific Coast of North America to the Atlantic Coast of South America, and particularly to Buenos Aires; that none of these preliminary negotiations resulted in the consummation of any contract between the libelant and respondents other than that evidenced by the bill of lading covering the transportation of the goods shipped, for the reason that the evidence shows that the preliminary negotiations were part of the oral contract of affreightment as finally consummated on March 10, 1930, and for the further reason that there is no evidence to support any finding that the contract between libelant and respondents was evidenced by the bill of lading covering the transportation of the goods shipped. Said finding was duly excepted to.

No. 11. The Special Master erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and

respondents agreed to transport not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930; to which failure to find libelant duly excepted.

Additional errors which the appeal specified are presented in the following formal specifications of the assignment of errors:

No. 1. The court erred in dismissing the libel and in failing to enter a decree in favor of libelant for damages arising from the breach by respondents of the contract of affreightment set forth in the libel.

No. 8. The court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that the bill of lading contained no provisions applicable to shipments between ports of the United States and foreign ports relating to the voyage to be pursued. Said finding was duly excepted to.

No. 12. That the Special Master erred in failing to find that thereafter and on or about the 18th day of March, 1930, respondents notified libelant that said vessel would be ready to load at San Francisco about April 4, 1930, and in failing to find that said subsequent notification definitely fixed the date upon which said M/S "Hindanger" agreed to be ready to load at San Francisco; to which failure to find libelant duly excepted.

No. 13. That the Special Master erred in failing to find that said M/S "Hindanger" was not ready to load at San Francisco on April 4, 1930, and in failing to find that said M/S "Hindanger" did not arrive in San Francisco until April 8, 1930, at 8 P. M. and was not ready to load until April 9, 1930; to which failure to find libelant duly excepted.

No. 14. That the Special Master erred in finding that said 11,000 cases of eggs were loaded on board said M/S "Hindanger" at San Francisco on or about April 7, 1930, and in failing to find that said 11,000 cases of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930; to which libelant duly excepted.

No. 16. That the Special Master erred in failing to find that the M/S "Hindanger" deviated from the agreed voyage in the same respects as respondents breached said oral contract as set out in paragraph 8 hereof; to which failure to find libelant duly excepted.

No. 17. That the Special Master erred in failing to find that respondents Westfal-Larsen & Co. and M/S "Hindanger" are liable to libelant for all damages caused libelant by reason of the aforesaid breaches of contract and deviations; to which failure to find libelant duly excepted.

No. 18. That the Special Master erred in holding that the libel should be dismissed and respondents awarded costs of action.

No. 19. That the Special Master erred in failing to award libelant its costs of action.

STATEMENT OF ARGUMENT.

Libelants will present to this court the statement of their position in the following points.

1. The conclusion of the Master that the rights of the parties are determined by the bill of lading and the finding of the court that the bill of lading evidenced the contract of the parties is not sustained by the evidence and results from a misapplication of the law to the evidence.

(a) If the negotiations testified to resulted in an oral contract between libelants and respondents, it was not superseded by the bills of lading.

(b) If the negotiations testified to resulted in an oral contract between respondents and Van Bokkelen, it was not superseded by the bills of lading.

(c) If the negotiations resulted in a situation in which libelants believed that the shipments moved under an oral contract between themselves and respondents, whereas respondents believed the shipments moved under an oral contract between themselves and Van Bokkelen, the bills of lading still do not determine the rights of the parties.

2. An oral contract existed between libelants and respondents and the finding of the Special Master and the court that there was no meeting of the minds of the parties in an oral contract resulted from a misapplication of the law to the facts.

3. The oral contract between libelants and respondents was breached by the voyage pursued.

4. The Special Master erred in failing to find that the M/S "Hindanger" deviated from the agreed voyage in the same respects as respondents breached said oral contract.

5. The Special Master erred in failing to find that said M/S "Hindanger" was not ready to load at San Francisco on April 4, 1930, and in failing to find that said M/S "Hindanger" did not arrive in San Francisco until April 8, 1930, at 8 P. M. and was not ready to load until April 9, 1930.

6. The Special Master erred in finding that said 11,000 cases of eggs were loaded on board said M/S "Hindanger" at San Francisco on or

about April 7, 1930, and in failing to find that said 11,000 cases of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930.

7. The court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that the bill of lading contained no provisions applicable to shipments between ports of the United States and foreign ports relating to the voyage to be pursued.

8. The libelants are entitled to a decree that they recover such damages as shall have been shown to have been sustained by them as a result of the breach of contract and deviation.

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1. **THE CONCLUSION OF THE MASTER THAT THE RIGHTS OF THE PARTIES ARE DETERMINED BY THE BILL OF LADING AND THE FINDING OF THE COURT THAT THE BILL OF LADING EVIDENCED THE CONTRACT OF THE PARTIES IS NOT SUSTAINED BY THE EVIDENCE AND RESULTS FROM A MISAPPLICATION OF THE LAW TO THE EVIDENCE.**

Under no theory of the evidence could the bill of lading evidence the contract or determine the rights of the parties. There are but three ways in which effect can be given to the testimony of libelants and respondents. If the libelants' testimony is believed, the shipments moved under an oral contract with respondents. If respondents' testimony is believed, the shipments moved under an oral contract with Van Bokkelen. If an attempt be made to reconcile the

testimony of the witnesses for libelants and respondents, this can only be done by finding that libelants believed that they contracted orally with respondents, whereas respondents believed that they contracted orally with Van Bokkelen, and that consequently there was no meeting of the minds of libelants and respondents, which would result in reaching the same conclusion as the Special Master when he held that there was no meeting of the minds upon an oral contract. We will consider each of these possibilities on the question of whether the bills of lading can constitute the contract of affreightment or determine the rights of the parties.

(a) If the negotiations testified to resulted in an oral contract between libelants and respondents, it was not superseded by the bills of lading.

Where a contract of affreightment is entered into by a carrier and a shipper, a subsequently issued bill of lading does not displace it in the absence of affirmative proof that the parties intended to contract on the terms set out in the bill of lading. Not only is such affirmative proof lacking in this case but, to the contrary, respondents' witness Mr. Wintemute testified that there were no negotiations between the parties subsequent to those which he claims resulted in an oral contract of affreightment (304). In *Northern Pacific R. Co. v. American Trading Co.*, 195 U. S. 439, 25 S. Ct. Rep. 84, a contract of affreightment had been completed by exchange of correspondence providing for shipment via the Northern Pacific Railroad Co. to Tacoma, Washington, thence via a certain steamer sailing on October 30th to Yokohama. The goods were

not forwarded on the steamer designated and the railroad company was sued for damages caused by failure to transport direct to Yokohama. The railroad company set up, among other defenses, that the bill of lading is the controlling contract and by its terms the receiver was not liable beyond its own line.

The bill of lading had been issued to libelant after the goods were loaded into cars and the particular clause relied upon was not called to the attention of the shipper's agent. As shown above, the railroad company relied upon the bill of lading exempting it from liability for failure of the vessel to transport the goods as this loss came within the bill of lading provision that the carrier would not be liable beyond its own line. The court held that the provisions of the bill of lading would not govern and held the carrier liable under the terms of the original contract of affreightment. The court stated:

> "We regarded as entirely clear that no such effacement of the original contract was meant by the receipt of the bill of lading. The railroad company had no power alone to alter that contract and it could not alter it by simply issuing a bill of lading, unless the other party assented to its conditions, and thereby made a new and different contract."

While this case involved a contract consummated by an exchange of correspondence, the Supreme Court cited with approval the case of *Bostwick v. B. & O. R. Co.,* 45 N. Y. 712, where it was held that under the circumstances of that case the acceptance of a bill of lading would not alter a previously made *oral* contract

in relation to the shipment. Obviously, then, the rule of this case applies to any prior contract of affreightment whether it be oral or written.

The case of *Northern Pacific R. Co. v. American Trading Co.,* supra, was made the basis for the decision in the *Mar Mediterraneo,* 1 F. (2d) 459, in which an action was brought upon an oral contract of affreightment. The carrier set up by way of defense certain clauses of the bill of lading issued subsequent to the making of the oral contract and at the time of delivery of the goods. The respondent excepted in that case to the libel upon the ground, among others, "That the libel does not show on its face either a compliance with the notice clause contained in the bill of lading or a waiver of compliance by claimant, and by reason of the premises the libel does not state a cause of action". In passing on this exception, the court stated:

> "With respect to the third exception, the libel recites an agreement of carriage, and thereafter the issuance of a bill of lading. The contract arose before the bill of lading issued, and the latter is therefore merely a receipt for the goods to be transported. Northern Pacific R. R. Co. v. American Trading Co., 195 U. S. 439, 465, 25 Sup. Ct. 84, 49 L. Ed. 269. The exception is overruled."

In the *Isle de Sumatra,* 286 Fed. 436, the goods were shipped pursuant to a contract of affreightment and a bill of lading was issued at the time of shipment. The vessel departed from the voyage agreed to in the original contract of affreightment but sought to excuse this departure under a clause in the bill of lading.

The court held the carrier to the original contract of affreightment holding that the prior agreement as to a direct voyage should be considered as a part of the whole contract including the bill of lading. In that case a deviation was found to exist though consisting of calling at a single extra port, the court emphasizing the fact that the early arrival of the vessel at destination was known by the parties.

In the *Julia Luckenbach,* 1923 A. M. C. 479, the oral contract of affreightment provided that the libelant would ship, on a specified steamer, a shipment of onions. This was a perishable product and it was agreed that it would be stowed between decks. It was further agreed that the vessel would proceed direct to the port of Philadelphia without stopping at any place except San Pedro. The vessel did not proceed direct to Philadelphia, sailing to New York first, and the cargo was not loaded between decks, and the respondent claimed "first, that there was no such oral agreement; second, that it was superseded, if there was one, by a certain letter; and, third, that the bill of lading does not contain these stipulations". The court held that the oral contract was proved, that it was not superseded by the letter which did not contain the full terms of the contract and that it was not superseded by the bill of lading. On the latter point the court said:

> "So far as the bill of lading is concerned, it is, of course, well established that a bill of lading supersedes all previous agreements and negotiations *if it becomes the contract.* In the answer, however, the respondent does not rely upon the

> bill of lading, but alleges, in so many words, that the only contract between the parties was this letter. In a case in this court by Judge De Haven, the Arctic Bird, 109 Fed. 167, Judge De Haven pointed out that the general rule in regard to bills of lading does not apply where the bill of lading is merely given as a receipt for the goods and was not intended to be the contract of the parties." (Italics ours.)

In the case of the *Arctic Bird,* supra, the court held that the contract of affreightment was not superseded by a bill of lading subsequently delivered, saying:

> "When claim is made that a contract under which goods were accepted by a carrier for transportation has been superseded by a bill of lading subsequently delivered, it is certainly reasonable to require proof in support of such claim, proof of the actual assent of the shipper to the terms contained in the bill of lading."

In the case of *Citta di Palermo,* 153 Fed. 378, the court had before it the question of a conflict between an oral contract of affreightment and a subsequently issued bill of lading. The case held that recovery could be had upon the oral contract of affreightment.

At the trial respondents urged strenuously that the issuance of the subsequent bill of lading, as a matter of law, barred the introduction of evidence of the oral contract which preceded it. (See 151 to 174.) The cases which it cited were all cases in which the court found that the bill of lading was accepted as the contract and under the parol evidence rule evidence of prior alleged arrangements as to certain phases of the agreement were excluded. Inasmuch as respondents

later conceded, on brief below, that a subsequent bill of lading does not supersede a prior oral contract, we will not consider those cases in detail in this brief. Under authorities which we have cited, if the oral contract with libelants was proved the holding that the bill of lading determined the rights of the parties or evidenced the contract is clearly erroneous.

(b) If the negotiations testified to resulted in an oral contract between respondents and Van Bokkelen, it was not superseded by the bills of lading.

The foregoing authorities demonstrate that as between the parties the issuance of a bill of lading does not supersede a prior oral contract. Respondents' defense to this action, at the trial, was upon the theory that the shipments moved under an oral contract with Van Bokkelen. Since respondents will not be permitted upon appeal to urge a different defense than that upon which they relied at the trial, we believe that the following citation from respondents' brief before the Special Master will dispense with a further review of respondents' testimony on this point. At page 10 of their brief before the Special Master respondents stated:

> "There was a definite agreement between Mr. Wintemute and Mr. Van Bokkelen on March 8th by which all of the elements of the contract for the carriage of these eggs were agreed upon. It is unnecessary for us to set forth in detail the testimony of the various parties which establishes that no contract was ever entered into between the libelants and respondents as claimed by the libelants, and that the only oral contract entered into was with Mr. Van Bokkelen. Libelants tes-

> tify that Mr. Van Bokkelen had no authority to enter into a contract with them. With this we are not concerned. Had the eggs not been shipped, the respondents in this case would have, we submit, a clear-cut case against Mr. Van Bokkelen for dead freight for a failure to have shipped the eggs. The amount, 15,000 cases, was agreed upon; the rate, 30 cents, was agreed upon; the ship, the "Hindanger", was agreed upon, and the expected time of sailing from the two ports was settled."

No intent to supersede an oral contract between respondents and Van Bokkelen could be inferred by the issuance of a bill of lading to libelants, not only for the reasons that support the rule as between parties to the contract, but also because it would mean that Van Bokkelen's contract, if one existed, would be made null and void by the actions of other parties and without his assent. (*Burns v. Burns*, 131 Fed. 238.)

We do not for one moment concede that the evidence in this case would justify a finding of an oral contract between respondents and Van Bokkelen pursuant to which all of Van Bokkelen's obligations were performed by libelants. We only state respondents' theory of the evidence to show the positive error in the finding that the bills of lading evidenced the contract or determined the rights of the parties.

(c) If the negotiations resulted in a situation in which libelants believed that the shipments moved under an oral contract between themselves and respondents, whereas respondents believed the shipments moved under an oral contract between themselves and Van Bokkelen, the bills of lading still do not determine the rights of the parties.

A consideration of this question involves an analysis of the basis upon which the bill of lading may determine the rights of the parties.

In *Thompson on Bills of Lading*, the opening paragraph is devoted to a consideration of the general principle of contracts which the author considers equally applicable to bills of lading. The author points out that no agreement which fails to satisfy any of these conditions, including the mutual assent of the parties and the intention to make the agreement, is legally enforceable. Where an oral contract is *actually* entered into between the parties, the bill of lading does not supersede that contract in the absence of proof of an intention that it should. We respectfully submit that these cases are not based upon any difficulty in reducing an oral contract to writing but upon the absence of an intention to contract upon the terms set out in the bill of lading under such circumstances. In other words, it is not the oral contract in itself which prevents the written bill of lading being deemed to express the agreement of the parties; the fact that an oral contract has been entered into is taken to be proof that the parties *did not intend* to contract on the terms set out in the bill of lading in the absence of specific proof to the contrary. Obviously the parties would no

more intend that the bill of lading should express the terms of their agreement when there was an *actual* meeting of the minds than *when each thought that the shipments were moving pursuant to an oral contract.*

Where there is an oral contract between the parties, the courts apparently find no *offer* to contract in the issuance of the bill of lading by the steamship company and no *acceptance* by the shipper upon its receipt of the bill of lading, because the law does not consider that under such circumstances the parties intended to offer or accept a contract. How, then, could it be said that the intent of the parties is any different if the minds of the parties did not actually meet upon an oral contract but each *believed* that the shipment was being made pursuant to an oral contract? This is particularly obvious in the present case where respondent claims that the shipments moved under an oral contract with Van Bokkelen. Certainly respondents would not intend to contract with libelants on the terms contained in the bills of lading if they believed the contract under which the shipments moved was with Van Bokkelen.

The obvious rule of contract law, that if neither party intended the making of a contract by what was done no contract would result, was recently stated by the Circuit Court of Appeals for the Sixth Circuit in *National Bank of Kentucky v. Louisville Trust Co.*, 67 F. (2d) 97. Contracts are not made by the court but by the parties. Where a bill of lading is issued under circumstances which indicate an intent that

the parties deemed it to state the agreement under which the goods were being shipped, it determines the rights of the parties. Where the circumstances are such that no intent to contract on the terms set forth in the bill of lading can be inferred, then the bill of lading is deemed merely a receipt or a document of title and not the contract. It is, of course, not necessary that any express contract, oral or written, be made for the transportation of goods by a common carrier. If no express contract is made the law raises by implication an implied contract to transport the goods on the intended voyage at a reasonable rate.

As we have shown, where a prior oral contract between the parties exists, there is no inference that the bill of lading constitutes the contract and affirmative proof of an intent to ship under the terms set forth in the bill of lading must be shown. No such intent was shown in this case. On the other hand, where there have been no prior negotiations or where the prior negotiations have related only to some particular phase of the transportation, the courts hold that the issuance of the bill of lading and its acceptance by the shipper raises the presumption that it is intended to be the contract. We are familiar with no case in which a bill of lading has been issued under such circumstances as result from the construction of the evidence which we are assuming here,—that is, where each party believed that it had an oral contract of affreightment under which the shipments were moving but where there was no actual meeting of the minds of the parties in such an oral contract. The

question is here presented whether under such circumstances an intent to contract can be found. We respectfully submit that the true rule underlying the decisions, holding that where an actual oral contract exists the bill of lading does not control, supports libelants' position that the bill of lading would not constitute the contract where both parties believed that the shipments moved under an oral contract of affreightment.

We have now considered the only possible constructions which can conceivably be placed upon the evidence in this case, and have shown that no theory of the evidence sustains the finding that the bill of lading evidenced the contract. When this error is corrected by this court it becomes necessary to determine upon all the evidence just what contract was made for the transportation of these eggs. The Special Master and the court both recognized, impliedly at least, that there was a contractual relationship between libelants and respondents. We will now show that this contract was the oral contract which libelants pleaded and proved.

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2. AN ORAL CONTRACT EXISTED BETWEEN LIBELANTS AND RESPONDENTS AND THE FINDING OF THE SPECIAL MASTER AND THE COURT THAT THERE WAS NO MEETING OF THE MINDS OF THE PARTIES IN AN ORAL CONTRACT RESULTED FROM A MISAPPLICATION OF THE LAW TO THE FACTS.

The factual situation disclosed by the testimony of witnesses for both libelants and respondents proves

conclusively that these shipments moved under an oral contract of affreightment. We have previously shown that the Special Master and the court failed to accord to respondents' concession that an oral contract was made in March, the weight to which it was entitled on the issue of whether the bill of lading constituted the contract of affreightment. We will now show that the testimony was likewise ignored in determining what constituted the contract under which the shipment moved. Since the finding of the court that the bill of lading evidenced the contract must be rejected, it becomes necessary to determine upon the evidence what did constitute that contract.

The evidence shows an oral contract of affreightment between libelants and respondents for the transportation of these eggs under refrigeration upon a voyage to commence not later than March 24th from Seattle and April 4th from San Francisco, to be of approximately 35 days' duration and to reach Buenos Aires by May 10th. Libelants' evidence thoroughly establishes every element of the contract claimed. The meeting of February 15, 1930, was testified to by the witnesses McKibben and Rother and, unless their testimony be wholly disregarded, it shows that at that time the respondents positively agreed that the vessel would take but 35 days and that respondents, having full knowledge of the seasonal nature of the market in Buenos Aires, represented that a shipment on the M/S "Hindanger" would reach that port by early May. Where a seasonal condition of the market is called to the attention of the vessel, and a contract made for delivery in that seasonal market, the time

of the represented voyage becomes of primary importance.

Walton N. Moore Drygoods Co. v. Panama Mail Steamship Co., 1925 A. M. C. 1261.
The Iossifoglu, 32 F. (2d) 928 at 933.

The positive testimony of Mr. McKibben and Mr. Rother as to the meeting of February 15th was scarcely contradicted by Mr. Wintemute, the only witness of respondents who testified as to this conversation, and in connection with his testimony it is to be borne in mind that he admitted that prior to hearing the testimony of libelants' witnesses he did not recall the conversation at all when placed upon the stand (321). Upon cross-examination Mr. Wintemute conceded that his recollection of that meeting was extremely vague and as to most of the testimony of libelants' witnesses was unable to either affirm or deny the truth of the statements (341-342-343).

We do not claim that at this February meeting a complete contract was entered into. As has been shown, the oral contract was finally consummated on March 10, 1930. However, at the prior negotiations certain vital parts of the ultimate contract were agreed upon and by those negotiations the intended voyage, with reference to which the contract was entered into, was determined. That the sailing schedule was discussed in these negotiations was found by the Special Master.

Prior negotiations of this sort form the basis of a contract made with reference to them. Libelants' witness Mr. Rother, sales manager of Poultry Pro-

ducers, stated that as a result of these negotiations he commenced to assemble the eggs (257). The facts of this case are squarely within those of *Armendaiz Brothers v. United States,* 1925 A. M. C. 560, in which representations by advertising and in response to personal inquiry as to the sailing date of the vessel were held to constitute part of a binding oral contract of affreightment and were a warranty that the vessel would sail on or about the advertised and represented date for breach of which the vessel was liable. The statement of fact in that case brings it so squarely in point in the instant proceeding that we will cite at some length from the decision:

> "This is a suit to recover $4,000. damages alleged to have been sustained by libellants as a result of the undue delay in the sailing of the steamship Ablanset from New York to Bilbao, Spain, which caused a partial loss of market for libellants' sugar.
>
> Armendaiz Brothers, Inc. in New York City, were negotiating with Trueba & Pardo in Bilbao, Spain, for the sale of several hundred tons of sugar. A representative of Armendaiz Brothers, Inc. investigating the sailings of vesels for Spain, found in the issue of September 25th, 1920, of the Journal of Commerce & Commercial Bulletin, a commercial paper published on that day in the City of New York, an advertisement of Norton, Lilly & Company, representing the steamship Ablanset as sailing on September 30th, 1920, for Bilbao, Spain. He then personally applied to Norton, Lilly & Company, the agent of the United States Shipping Board in the operation and management of the said Ablanset. In reply to his

inquiries, representatives of Norton, Lilly & Company informed him that the Ablanset could transport the cargo offered for shipment by Armendaiz Brothers, Inc. on the Ablanset and at the same time represented that that ship would sail not later than October 15th, 1920, and would sail directly from New York to Bilbao, Spain. Relying upon these representations, Armendaiz Brothers, Inc. on October 6th, 1920, completed the second of two contracts of sale for 200 tons of sugar to Trueba & Pardo in two lots of 1,004 bags each, and to be shipped immediately, c. i. f.

The representative of Armendaiz Brothers, Inc. then again personally went to Norton, Lilly & Company and informed that Company's representatives that it was necessary that these 200 tons of sugar be shipped immediately and be delivered without delay, as the market in sugar was declining. At that time the representation was again made by Norton, Lilly & Company that the ship would actually sail on or before October 15th and an oral contract of affreightment was there and then entered into between Armendaiz Brothers, Inc. and the United States Shipping Board through its agent, Norton, Lilly & Company, for the shipment of 200 tons of sugar from New York to Spain on the Ablanset, which was to sail on or about October 15th, 1920.

From September 25th, 1920, until November 20th, 1920, Norton, Lilly & Company advertised the sailing of the steamship Ablanset on various dates, the last sailing date being given as November 10th. This date of November 10th was given in the advertisement even as late as November 20th, after the steamer had sailed on November 13th.

A brief letter of confirmation of the engagement of freight space for 200 tons of sugar was written by Armendaiz Brothers, Inc. on October 6th, 1920.

A permit to deliver the shipment of sugar to the steamship pier was given to Armendaiz Brothers, Inc. by Norton, Lilly & Company, giving the period October 11th to the 13th, 1920, as the permitted time of delivery to the vessel. All of the 200 tons of sugar were delivered to the vessel on or before October 13th, 1920. At that time receipts were obtained for the sugar, which were exchanged for bills of lading dated October 13th, 1920. No date of sailing was mentioned in either of these."

With reference to the question of whether or not the oral contract of affreightment was binding, the court said, at page 563:

"The oral contract of affreightment was a binding agreement which included a representation as to sailing date. The Julia Luckenbach, 1923 A. M. C. 479. This representation amounted to a warranty that the vessel would sail on or about October 15th, 1920, or within a reasonable time thereafter, for the breach of which the vessel is liable. Williams Steamship Company v. McLeod Lumber Company, 1924 A. M. C. 663; Bolle Watson v. Royal Belge, 1924 A. M. C. 530.

The bill of lading which libellant got was more in the nature of a receipt rather than a complete contract of carriage as in the Julia Luckenbach, 1923 A. M. C. 479, and the G. R. Crowe, 1924 A. M. C. 5."

Upon the question of whether an oral contract was actually consummated between libelants and respondents by the negotiations in March, the Master's finding is that there was no meeting of the minds upon a contract. The implication of this finding is that the Special Master did not reject the testimony of libelants' witnesses but found that that testimony did not establish an oral contract. We have previously pointed out that the only issue of fact in this connection is whether the oral contract, admittedly made with someone, was made with libelants on March 10th or with Van Bokkelen on March 8th. Mr. Wintemute testified that in his opinion he made an oral contract on March 8th with Van Bokkelen with the understanding that libelants would confirm the fact that they would furnish the eggs to be shipped; that he subsequently discussed the matter with libelants and in an agreement with them modified, as to the number of eggs to be shipped, the arrangement made with Van Bokkelen. The testimony of the witness John Lawler was that he confirmed the arrangement made on March 8th with Van Bokkelen because Van Bokkelen had no title to the eggs and Mr. Wintemute wanted the confirmation to come from his office (268). This confirmation was not merely of the fact that the Association would supply the eggs (270). His testimony was positively that libelants would ship from 10,000 to 15,000 cases of eggs on the "Hindanger" and Mr. Wintemute accepted this confirmation of space.

Both the Special Master and the court below failed to correctly apply the law to the facts in failing to find that the above negotiations resulted in an oral

contract. Clearly there was a contract made and it was for the court to determine whether it was between respondents and libelants or respondents and Van Bokkelen. While it is true that the opinion of Wintemute that the contract was with Van Bokkelen cannot be accepted because of its inherent improbability, its effect as an admission of the existence of some oral contract cannot be ignored. It is the failure to accord the proper weight to the conceded fact that these eggs moved under an oral contract which resulted in the decision of the Special Master and of the court.

We have no doubt that this court will, as did the Special Master and the trial court, reject the theory of respondents that the oral contract was with Van Bokkelen. This defense was not conceived by respondents until following the filing of their verified answers in the two libels in both of which they denied the existence of any contract, oral or otherwise, for the transportation of the eggs other than that which is evidenced by the bill of lading under which the eggs were shipped (26) and further denied that "the issuance, execution or delivery of said bill of lading was in pursuance of the alleged, or any, oral contract referred to in the libel herein, or in pursuance of any contract, oral or otherwise, other than the contract evidenced by the terms of said bill of lading, * * *" (24). It is inconsistent with all the tangible evidence in the case, including the fact that libelants owned the eggs, shipped them, and paid the freight on them and accepted delivery of them at Buenos Aires. It is directly disproved by the letter of March 12, 1930

(respondents' Exhibit "A"), by respondent General Steamship Corporation on behalf of the other respondents in which libelants' selling agent was written as follows:

> "When Mr. Von Bokkelen was in our office at the end of last week, he requested us to reserve space on our MS. 'Hindanger' sailing from San Francisco early April, for a total of 15,000 cases eggs for Buenos Aires, to be loaded as follows:
>
> Seattle ..... 3,000 cases
> San Francisco ..... 12,000 "
>
> Rate of freight 70¢ per case.
>
> Kindly confirm the above booking immediately."

This letter is a direct admission by respondents, immediately after the conversations of Wintemute with Van Bokkelen and Lawler, that Van Bokkelen had merely *reserved* the space and that the *booking* was between libelants and respondents. Again the regular booking form of space subsequently sent out showed that respondents were seeking written confirmation of the oral contract with libelants. (Exhibit 3.) This confirmation failed to state correctly certain of the agreements of the parties and was never signed by libelants, but it stands as an admission by respondents that the oral contract, admittedly made with someone, was actually made with libelants. That respondents' conception of the negotiations with Van Bokkelen and Lawler was not deemed to be for a booking of space for Van Bokkelen's account at the time they were made is conclusively shown by the fact that in Exhibit 3 respondents state "we confirm engagement of space *for your account* on the following terms". Exhibit 3

was addressed to Pacific Egg Producers, Inc. and deals with these particular shipments.

Respondents on argument below relied very strongly on the fact that Mr. Lawler testified as follows, and inferred therefrom that his confirmation was not the consummation of a contract:

> "Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?
>
> A. The contract with whom?
>
> Q. With Westfal, Larsen & Company through the General Steamship Corporation?
>
> A. The contract, or the arrangement was made with Walter Van Bokkelen and he telephoned that I had to confirm it with Mr. Wintemute.
>
> Q. Did you confirm it?
>
> A. Yes" (263).

In view of the fact that the Special Master obviously rejected the testimony of Mr. Wintemute that the contract was made with Van Bokkelen, it appears that his finding that there was no meeting of the minds is based upon an erroneous application of the law to this testimony. This testimony must be considered in the light of Mr. Lawler's testimony which immediately preceded this statement.

> "Q. What was stated in that conversation, Mr. Lawler?
>
> A. I confirmed the space on the 'Hindanger' which had been arranged for on the Saturday previous by Mr. Van Bokkelen.
>
> Q. What did you tell him?
>
> A. I told him that we would ship from ten to fifteen thousand cases of eggs on the 'Hindanger'.
>
> Q. Was the rate agreed upon?

A. The rate was agreed upon some time prior to that. I had no negotiations on the rate as far as I can remember.

Q. Had you been advised as to it?

A. Yes, I had; if I remember correctly I had a wire from New York that the rate had been agreed to.

Q. Were these eggs that were shipped shipped at that rate?

A. Yes.

Q. Did Mr. Wintemute accept the confirmation of the space?

A. Yes.

Q. At that time did you have in mind the statements that had been made in reference to the time of transit of this vessel?

A. In that respect I could give you the same information that has already been given to you by Mr. Rother.

Q. What did you have in mind?

A. About 35 days in transit. The boat had been somewhat delayed, if I remember correctly, it was somewhere around the first of April that would bring it in—at least the first part of May.

Q. Did the information that you had as to the sailing date and the time of the voyage have anything to do with your confirmation of this space?

A. The time element was one of the most important elements in this whole thing.

Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date? (262-263).

The question as to the effect of this conversation between Mr. Wintemute and Mr. Lawler is for the court

to determine. Had Mr. Lawler stated that in his opinion this conversation was the actual making of the contract, it would have added nothing of probative force to the testimony which he gave. That conversation, as a matter of law, was the making of a contract. Mr. Lawler confined himself strictly to relating facts and simply avoided expressing his conclusion as to when in a series of negotiations of this sort the contract would be made as a matter of law. There is no question from Mr. Lawler's testimony that he knew that the combination of negotiations testified to resulted in a contract *between libelants and respondents.* We believe that the Special Master's error in failing to find a meeting of the minds must have resulted from an erroneous conception of the weight to be accorded the opinion of the witness as to what constituted the contract. All the facts upon which the witness could base such an opinion were in evidence and those facts definitely prove the oral contract claimed by libelants.

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3. **THE ORAL CONTRACT BETWEEN LIBELANTS AND RESPONDENTS WAS BREACHED BY THE VOYAGE PURSUED.**

A contract of affreightment is a mercantile contract as to which time is of the essence. In *Gray v. Moore,* 37 Fed. 266, the court said:

> "When time, therefore, is specified, and both parties contract with regard to it, whether it be the time at which the vessel is to be ready to receive cargo, or the day of sailing, or of arrival

> outwards, or the day of another event in the voyage, the court holds that it is in the nature of a condition precedent to the rights of the owner under the rest of the charter party."

This general proposition of law is thoroughly established and is borne out by cases allowing recovery for failure to arrive or sail at the time agreed upon, whenever from the circumstances of the case the time is deemed to have been definitely fixed. We have already shown that in *The Ablanset,* supra, on facts substantially similar to the principal case the court held that the "oral contract of affreightment was a binding agreement which included a representation as to the sailing date", and the vessel was held liable for its breach. In *The Texandrier,* 1923 A. M. C. 722, the contract of affreightment specified that the vessel was due to arrive middle of May. In that case the vessel actually sailed the end of May and it was held to be a breach of contract. In *Bolle Watson v. Royal Belge,* 1924 A. M. C. 530, an action was maintained for the breach of an agreement as to the time of furnishing the vessel. It is admitted that when the arrangement was made with Van Bokkelen the sailing date of the vessel was represented as about March 24 from Seattle, and April 4th from San Francisco (298). Subsequently, on March 18th respondents notified libelants that the vessel would be ready to load about April 4th at San Francisco and March 24th at Seattle. (Exhibit 3.) Even if the first arrangement was not a binding warranty as to the sailing date, this subsequent notification became such a warranty and fixed the time at which respondents must be ready to

load under the rule of *Williams Steamship Co. v. McLeod Lumber Company,* 1924 A. M. C. 663. In that case the original contract provided for loading about June 5th. The court, while emphasizing the fact that time is of the essence of mercantile contracts and consequently of such a contract as this, held that the term "about June 5th" was apparently not intended to definitely fix the sailing date. Thereafter, however, the vessel orally notified the shipper that the vessel would be ready to sail about June 12th. The court held that the subsequent notification definitely fixed the date and that upon arrival of the vessel on June 18th the shipper was relieved of his obligation to accept the space. The delay of six days from the date of the second notification was held to have constituted a breach of the contract of affreightment. When the law of that case is applied to the facts here, libelants' right to recover is established. The vessel was not ready to load at Seattle until March 27th, and was not ready to load at San Francisco until April 9th. Libelants are entitled to their damages for this breach. This provision of the contract was not waived by the acceptance of delayed performance.

Boak v. United States Shipping Board E. F. Corp., 11 F. (2d) 523;

Cohn v. United States Shipping Board, 20 F. (2d) 56.

As to the agreement that the vessel would make the voyage in 35 days from San Francisco and arrive at Buenos Aires not later than May 10th, a breach of contract by respondents is conclusively proved by the

admitted fact that the voyage was of 49 days duration from San Francisco and that the vessel arrived in Buenos Aires on May 29th. The advertised schedule, with reference to which the contract was made, showed that no call would be made at either Pernambuco or Bahia and that the stay at Montevideo would be but one day. In each of these representations the contract was breached by the voluntary act of the respondents in booking cargo which required calls at both Pernambuco and Bahia and which required eight days to discharge at Montevideo instead of one as scheduled. Under the authority of the cases previously cited libelants are clearly entitled to recover their damages by reason of the delay caused by the respondents' act.

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4. THE SPECIAL MASTER ERRED IN FAILING TO FIND THAT THE M S "HINDANGER" DEVIATED FROM THE AGREED VOYAGE IN THE SAME RESPECTS AS RESPONDENTS BREACHED SAID ORAL CONTRACT.

If, upon a reconsideration of the record herein, this court finds that an oral contract of affreightment was entered into by libelants with respondents for the transportation of these goods upon the voyage agreed to at the conference of February 15, 1930, it is obvious that this oral contract was breached and that libelants are entitled to recover their damages. If this court should find, however, that there was no actual meeting of the minds of the parties hereto in an oral contract of affreightment and that the shipments moved upon an implied contract it then becomes the duty of this court to determine whether or not the respondents

deviated from the voyage which they impliedly contracted to make. Upon this question the Master made no finding of any kind as his only finding on the question of deviation was that the voyage pursued was within the voyage contemplated under the liberty of call clause of the bill of lading. Since we have heretofore shown that the bill of lading cannot govern the rights of the parties to this action, it necessarily follows that the voyage which the carrier was obligated to make must be determined as an original proposition by this court in order to determine whether a deviation therefrom occurred.

The modern conception of a deviation is set out in the case of *The Pinellas,* 1929 A. M. C. 1301, at page 1313, where the court said:

> "But the cargo owners also contend that the shipowner is liable for damages on the ground that there was a deviation, and that the shipowner thereby became the insurer of the cargo, or at least the burden was cast upon him of showing that the loss would have occurred if there had been no deviation, which has not been shown in this case.
>
> The term 'deviation' does not at the present day have the limited meaning that would ordinarily be suggested of a mere change in the route of a vessel, but it has a more varied meaning and wider significance. It was originally employed no doubt for the purpose its lexicographical definition implies, namely, to express the wandering or straying of a vessel from the customary course of the voyage; but it seems now to comprehend in general every conduct of a ship or other vessel used in commerce tending

> to vary or increase the risk incident to the shipment. It comprehends any voluntary act of the shipowner, or voluntary departure from the usual course, without necessity or any reasonable cause, which increases or changes the risk in the shipment; and when such deviation occurs, the shipowner becomes liable as an insurer or at least the burden is cast upon him to show that the loss would have occurred if there had been no deviation."

The distance of the deviation is of no importance and may result from a movement within the confines of a single port. (*Robin Hood,* 1932 A. M. C. 811.) Likewise a very slight delay in loading may constitute a deviation as in the case of *The Hermosa,* 1931 A. M. C. 1075, in which it was held that a delay of approximately twenty-seven hours in sailing caused by the intoxication of the Master was a deviation. Obviously no particular significance attaches to the fact that the intoxication of the Master was the cause of the delay upon the question of the delay in sailing constituting a deviation. If such a delay is a deviation, then any other unexcused delay in sailing constitutes a deviation, since a deviation is not founded upon negligence. Likewise, in the case of *The Sanguiseppe,* 1923 A. M. C. 608, a delay in sailing from the loading port was held to constitute a deviation.

Even if this court should find that there was no oral contract of affreightment fixing the precise voyage, the intended voyage must be implied from the representations, by advertising and otherwise, that the vessel would pursue the voyage which would take

approximately 35 days, that the vessel would stop only at the ports named in the advertisement and, allowing reasonable variation, for approximately the time represented by the advertisements. Nothing in the prior voyages of the vessels, or in the advertisements and representations concerning this or other voyages, indicated a call at Bahia in South America. The advertisment in the Guide, for example (84), shows the vessel as sailing via Panama Canal for Rio de Janeiro, Santos, Buenos Aires and Montevideo, Rosario and Santa Fe (if inducements offer). Thus the advertisement purports to show the extent of the calls with the right to eliminate some of them if inducements for the calls did not offer. It contains no indication that the vessel will proceed to Bahia or Pernambuco.

No vessel of respondents in this service had ever before called at Bahia, as shown by the voyages listed in the respondents' answer to libelants' interrogatories, and only one had ever stopped at Pernambuco. The stop at Bahia was for the purpose of discharging *gasoline*. It involved two days delay in the voyage. Certainly it is a substantial increase in the risk of the voyage to send a vessel into strange ports in South America to discharge an explosive such as gasoline. A deviation from the agreed voyage also occurred in the extended stay in Montevideo of eight days. While the represented time on the sailing schedule of one day may not have constituted an absolute limitation on its stay at that port, nevertheless in view of the testimony and of the known sailing speed of the vessel, it is obvious that the cargo booked for Monte-

video could not possibly be discharged in time to permit any such voyage as was represented.

The depositions of the Master and Chief Officer of the vessel show that substantially the entire delay was caused by the voluntary act of the respondents in booking cargo which would require that the voyage take approximately 14 days longer than the agreed time. Under those circumstances the respondents are clearly liable for the loss caused by the delay.

When it is borne in mind that the service of the respondents between Pacific ports and Buenos Aires through the Panama Canal had only commenced in October, 1929, and that but three voyages had been completed prior to the voyage here involved (38), the significance of the advertisements of respondents becomes obvious in determining the intended voyage. The importance of advertising in determining the intended voyage is well illustrated by the case of *General Hide & Skin Corporation v. United States,* 24 F. (2d) 736. That case concerned a shipment from Tientsin to New York under a broad liberty of call clause which is set out in the bill of lading. The court held that there were two routes from Tientsin to New York, one via Suez and one via Panama Canal, and that under the bill of lading, standing alone, the ship had the right to choose either route. The court held, however, that the vessel by advertising that it would proceed through the Panama Canal determined for the purposes of the contract the route which the vessel was to take. The court held:

> "The voyage on which it was contemplated to carry at the time of shipment can be shown by

> extrinsic evidence, and the carrier's advertisements may be shown to determine the voyage contemplated. Propeller Niagara v. Cordes, 21 How. 7, at page 24, 16 L. Ed. 41. * * * It clearly appears that the voyage advertised by the agent for the ship, and contemplated by shipper and the ship at the time the contract of affreightment was made, and on the commencement of the voyage, was via Panama."

The change in this voyage, as compared with the voyage represented by the respondents, was obviously for the purpose of saving the vessel from loss by reason of the fact that not sufficient cargo was offered the other ports for the agreed voyage. It was a change deliberately made by the vessel and, as is shown by the testimony of the Master of the "Hindanger" heretofore referred to, the entire cause of the delay was this scheduling of freight of such a character and to such ports as to make it impossible to complete the voyage in a shorter time. That this conduct of the respondents constitutes a deviation is clearly shown by the following language of the court in *General Hide & Skin Corporation v. United States,* supra.

> "The change in the course of the ship from the shorter Panama route to the longer Suez route constituted deviation, and was deliberately done to save the ship from loss by reason of the fact that not sufficient cargo was offered at other ports for the agreed voyage. By breaking its warranty not to deviate, the respondent, as owner of the ship, became the insurer of the cargo and liable for all damages occasioned to the consignee."

5. THE SPECIAL MASTER ERRED IN FAILING TO FIND THAT SAID M S "HINDANGER" WAS NOT READY TO LOAD AT SAN FRANCISCO ON APRIL 4, 1930, AND IN FAILING TO FIND THAT SAID M S "HINDANGER" DID NOT ARRIVE IN SAN FRANCISCO UNTIL APRIL 8, 1930, AT 8 P. M. AND WAS NOT READY TO LOAD UNTIL APRIL 9, 1930.

The arrival of the M/S "Hindanger" at San Francisco is stipulated to have been April 8th at 8 P. M. (78). The vessel commenced loading on the 9th (365). In connection with the corresponding exception to the failure of the Special Master to find that the M/S "Hindanger" was not ready to load at Seattle, Washington, until March 27, 1930, at 8 P. M., it was stipulated that the arrival date of the "Hindanger" in Seattle was March 27th (388).

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6. THE SPECIAL MASTER ERRED IN FINDING THAT SAID 11,000 CASES OF EGGS WERE LOADED ON BOARD SAID M S "HINDANGER" AT SAN FRANCISCO ON OR ABOUT APRIL 7, 1930, AND IN FAILING TO FIND THAT SAID 11,000 CASES OF EGGS WERE LOADED ON BOARD SAID VESSEL ON APRIL 9, 1930, AND APRIL 10, 1930.

This fact is proved by the stipulation that Mr. McCurdy, if called as a witness on behalf of libelants, would testify that the eggs would not have arrived in San Francisco from Santa Rosa, the originating point, for loading on the "Hindanger" until the day after the date on which the shipments left Santa Rosa, California, and the shipments were all shown to have been made from Santa Rosa on either April 7th or April 8th (392). Consequently, the finding that the shipments were loaded on board the "Hindanger"

on April 7th is erroneous and in view of the fact that the bill of lading would not be issued until the eggs were received (366) the date shown upon the bill of lading does not represent the actual date upon which the bill of lading was issued. We mention this because of the possible bearing of the time of issuance of the bill of lading upon the question of whether or not an intent to contract upon the terms of the bill of lading might be inferred.

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7. THE COURT ERRED IN FINDING THAT THE PORTS AT WHICH THE VESSEL STOPPED ENROUTE TO SOUTH AMERICA WERE SUCH AS COULD REASONABLY BE CONTEMPLATED WITHIN THE LIBERTIES PROVIDED BY THE TERMS OF THE BILL OF LADING FOR THE REASON THAT THE BILL OF LADING CONTAINED NO PROVISIONS APPLICABLE TO SHIPMENTS BETWEEN PORTS OF THE UNITED STATES AND FOREIGN PORTS RELATING TO THE VOYAGE TO BE PURSUED.

Even should the finding that the bills of lading constituted the contracts of the parties and determined the rights of the parties be sustained in the face of the evidence that the shipment moved under an oral contract of affreightment, the holding of the Special Master that "the bills of lading involved in the instant matters endow the vessel with the liberty to call at ports in geographical rotation as did the Hindanger" was without support in the record for the reason that the bills of lading have no liberty of call clauses applicable to this voyage. The so-called liberty of call clause contained in the bill of lading reads as follows:

"2. The vessel to have liberty, either before or after proceeding towards the port of discharge; to proceed to the said port via any port or ports in any order or rotation outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route; to pass the said port for which the cargo is destined and to return thereto; without same being deemed a deviation, whatever may be the reason for calling at or entering said port or ports, or for making such voyage or voyages, whether for the purpose of this, a prior, or subsequent voyage; to altogether depart from the customary route; to make or completely abandon the original voyage; to tranship or land and reship the goods at ports of shipment and transshipment, or at any other ports, or into any other steamer or steamers or sailing vessel for any purpose, and to forward to destination by another vessel; also to tow and assist vessels in all situations and to sail with or without pilots; all the said liberties, exceptions and conditions shall apply, although the vessel may be deviating from the voyage, and although such deviation may amount to a change or abandonment of the voyage; all such deviations are to be deemed within the contract voyage and notwithstanding unseaworthiness or unfitness of the ship at the commencement or during any period of the voyage."

Clause 23 of the bill of lading provides, in part,

"In all cases where merchandise or property is transported under this contract from or between ports of the United States and foreign ports within the meaning of said Act of 1893 * * * any provision of this bill of lading incon-

sistent with the said Act of Congress and revised statutes shall be treated as struck out and expunged."

It is libelants' position that the liberty of call clause in the bill of lading is clearly inconsistent with the Act of 1893, known as the Harter Act. Sections 1 and 2 of the Harter Act read as follows:

"1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence properly equip, man, provisions, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow

her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

If, by the liberty of call clause, the obligation of the vessel to properly deliver the cargo is in any way lessened, weakened or avoided, the clause is inconsistent with the Harter Act and by the very terms of the bill of lading would be treated as struck out and expunged and consequently could not form a basis for the decision in this action. The clause not only weakens, lessens and avoids the obligation of the carrier to properly deliver the goods but wholly relieves the vessel of making any delivery under the intended voyage. By the express terms of the provision each and every privilege therein contained applies although such deviation may amount to a change or abandonment of the voyage, and furthermore all such deviations are deemed within the contract voyage notwithstanding unseaworthiness or unfitness of the ship at the commencement or during any part of the voyage. This clause is not only inconsistent with the Harter Act but directly violates both clauses 1 and 2 of that Act. The requirement in the Harter Act respecting proper delivery is that the delivery must be delivery at destination on completion of the contemplated voyage. No liberty of call clause which results in an abandonment of that voyage is permitted by the Act. Thus, for example, in *Calderon v. Atlas Steamship Company,* 64 Fed. 874, a provision of the bill of lading that

"in case any part of the goods can not be found for delivery during the steamer's stay at port of

> destination they are to be forwarded at the first opportunity, when found, at company's expense, the steamer not to be held liable for any claim for delay or otherwise."

was held to be superseded and overridden by the provisions of Section 1 of the Harter Act. The court said, at page 876:

> "It is plain that independently of the ninth clause endorsed on the bill of lading as above quoted, there was 'a failure in the proper delivery' of these goods. 'Proper delivery' includes a timely delivery. It does not permit goods to be carried voluntarily away from the port of destination upon another voyage. The defense must, therefore, rest on the stipulation in the bill of lading. But the Harter Act prohibits the insertion of any stipulation excusing a 'failure in proper delivery'. The words 'proper delivery' as used in the act can not mean any kind of a delivery that may be stipulated for, however unreasonable the stipulation may be; since that would thwart the very purpose of the first section of the statute, which was designed to protect shippers against the imposition of unreasonable stipulations in bills of lading to the prejudice of their interests."

This case was affirmed by the United States Supreme Court upon this point in *Calderon v. Atlas Steamship Company,* 170 U. S. 272, 18 S. Ct. Rep. 588.

In *Swift & Co. v. Furness, Withy & Co.,* 87 Fed. 345, an exception was inserted in the bill of lading as follows:

> "With liberty to sail with or without pilots, to make deviation, and to call at any intermediate

> port or ports for any purpose, and to tow and assist vessels in all situations. * * *"

Relying on the definition of deviation in the case of *Hostetter v. Park,* 137 U. S. 30, 11 S. Ct. 1, respondents claimed that the use of the word "deviation" in the bill of lading was an express stipulation permitting such deviations though they be unnecessary and unreasonable. In connection with this contention the court stated, at page 347:

> "If rules of construction forced us to adopt the view of the contract urged by the defendant, and to hold that it provided that the owner might delay the delivery of goods at his pleasure, this would not avail the defendant; for we should then be compelled to hold the provision void, under the act of February 13, 1893, c. 105 (27 Stat. 445)."

See also:

> *Yukon Milling & Grain Company v. Lone Star Steamship Co.,* 40 F. (2d) 752, 1930 A. M. C. 582.

It is true that the courts have held to be lawful liberty of call clauses which, if literally construed, would permit almost any deviation from the intended voyage. Such clauses have been sustained, however, only because it was possible by construction to limit their application so as to bring them within the spirit of the Harter Act. Thus in *Dietrich v. United States Shipping Board,* 9 F. (2d) 733, the court stated at page 742:

> "While the provision in question cannot be construed to be void, or as intended to confer

> upon the shipowner an absolute and unrestricted liberty to delay for any length of time, and for any reason, or no reason, the transportation of the goods, *still the intention of the parties must be so restricted and limited as to apply only to delays fairly ancillary to the prescribed voyage.* In effect, the promise of the shipowner was to carry the goods to their destination as soon as the reasonable arrangements of the carrier respecting the voyage would allow." (Italics ours.)

In that proceeding, as in others, the court sustained the liberty of call clause because it felt that it could be construed so as not to allow departures which would defeat the substantial purpose of the contract. In the *Frederick Luckenbach,* 15 F. (2d) 241, the court stated, at page 243:

> "The rule is one of interpretation, by which the meaning of words having a general significance is confined within the particular purpose of the agreement. But in ascertaining the true sense in which general words are used, the words themselves cannot be deprived of all meaning, for this would not be to interpret the agreement but to erase a part of it. Thus instances may be found where, because of the particularity with which the parties have provided that the ship may depart from the established and customary route, *such departures, not foreign to the general purpose of the voyage have been permitted.*" (Italics ours.)

No construction can be placed upon the clause here in question which will limit its application to deviations within the scope of the intended voyage since it

in express terms applies to deviations which result in an abandonment of the voyage. The process of construction indulged in by the courts in cases of the nature of *Dietrich v. United States Shipping Board,* supra, unquestionably resulted from the application of the principle that where two constructions of a written contract are possible preference will be given to that which does not result in a violation of law. (*Great Northern Railway Co. v. Delmar Co.,* 283 U. S. 686, 51 S. Ct. Rep. 579.) In those cases the court was confronted with the alternative of decreeing the clauses unlawful by giving them a literal interpretation or of restricting their application by construction in order to make them lawful. Naturally, they were construed so as to make them lawful. Under this bill of lading, however, the question of unlawfulness of the clause does not arise. The bill of lading itself indicates that there are clauses contained therein which are inconsistent with the Harter Act and by its very terms provides for their expunction. Therefore, to give the words of the provision of these bills of lading their normal meaning, and in fact the only meaning which their language will sustain, results not in an unlawful contract but in their expunction by operation of the contract itself. Here the court is confronted not with the alternative of construing a clause so as to make it lawful or unlawful but of construing the bill of lading for or against the steamship company which drafted it. Under those circumstances, as held in *Gelderman v. Dollar Steamship Lines, Ltd.,* 41 F. (2d) 398,

> "the bill of lading, having been drawn by defendant, must be construed most strongly against it."

Obviously each and every provision of clause 2 of the bill of lading is tainted with the condition that it applies although it results in a complete abandonment of the voyage. Consequently, the entire provision must be treated as struck out and expunged and cannot form the basis for decision in this action.

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8. **THE LIBELANTS ARE ENTITLED TO A DECREE THAT THEY RECOVER SUCH DAMAGES AS SHALL HAVE BEEN SHOWN TO HAVE BEEN SUSTAINED BY THEM AS A RESULT OF THE BREACH OF CONTRACT AND DEVIATION.**

We respectfully submit that the decree of the court below dismissing the libels should be reversed and an interlocutory decree entered in favor of libelants, with costs, for the damages sustained by them by reason of the voyage pursued by the M/S "Hindanger". We are not unaware that where an issue of fact is tried by a Special Master upon reference by a court and thereafter a decree is entered in accordance with the findings of the Master by the trial court, this court will be reluctant to review the facts found. We have no hesitation, however, in seeking such review in this appeal for the reason that the decision of the Master unquestionably proceeds upon an erroneous conception of the law and an erroneous application of that law to the facts shown in the record.

Without the finding that the bill of lading determines the rights of the parties and that under the bill of lading the libelants are not entitled to recover, there

is no ground upon which the Master's report can be sustained. We have heretofore shown that the conclusion of the Master on this point is erroneous as a matter of law. The finding of the court that the bill of lading evidenced the contract is equally erroneous. We have endeavored to make it clear to the court that our position, that the bill of lading does not evidence the contract or determine the rights of the parties, is not based upon any conflict in the testimony but is predicated upon a proposition of law that regardless of whether libelants' testimony be believed or respondents' testimony be believed, or any part of the testimony of either libelants or respondents be believed, there is still no room, as a matter of law, for the finding that the bill of lading evidenced the contract or determined the rights of the parties.

The rule requiring great weight to be given to the decision of the Special Master is, of course, a sound one in cases in which it is applicable. It was recently considered in this circuit in the case of *Liisanantti v. Astoria North Beach Ferry Co.*, 64 F. (2d) 669, and this court recognized that the report of the Special Master in a reference such as this would be considered presumptively correct, but would be set aside or reversed on appeal for manifest errors in the consideration given to the evidence or in the application of the law. It is precisely such an error which has occurred in this case. See also:

Anderson v. Alaska Steamship Co., 22 F. (2d) 532.

It is true that the Special Master expressly found that there was no meeting of the minds of the parties hereto resulting in an oral contract. We respectfully submit, however, that the presumption in favor of this finding is greatly weakened by the recognition of the Master that a contractual relationship did exist between the parties which required that the bill of lading determined the rights. The Special Master obviously failed to accord sufficient weight to the fact admitted by both parties that an oral contract in fact existed with someone. The improbability of respondents' theory that the oral contract was between respondents and Van Bokkelen is recognized by the Master's failure to even consider the question of whether it existed. Instead of determining the issue raised by the evidence in the case of whether the oral contract admittedly made was made by respondents with Van Bokkelen or with libelants, the Special Master apparently considered the issue to be whether the contractual relationship between libelants and respondents, which he impliedly found, was evidenced by the bill of lading or by the oral contract claimed by libelants. Since we have shown that this resulted from an erroneous application of the law on the question of when a bill of lading is the contract, we have demonstrated that the presumption favoring his finding disappears. In determining, as we believe this court must, what contract between the parties regulates their rights, we respectfully submit that a review of the evidence shows that the shipment moved under the oral contract as claimed by libelants and that libelants

should recover. The decree should be reversed, and libelants are entitled to the interlocutory decree sought with costs.

Dated, San Francisco,
February 9, 1934.

Respectfully submitted.
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